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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

Bell Atlantic is now authorized to provide interexchange services in the state of New York. Southwestern Bell Telephone Company has filed an application for the same authority in Texas. The FCC has re-adopted rules establishing a minimum list of unbundled network elements ("UNEs"), ensuring that competitors have access to the incumbents' networks where denial of such access would impair their ability to provide telecommunications services they seek to offer. In addition, the FCC recently adopted rules granting Tier 1 ILECs significant pricing flexibility to lower special access rates, premised on the growth of competitive alternatives for special access customers.

Despite these inroads of competition, a few of the largest ILECs now are urging the Commission to engage in protectionism of the worst order. BellSouth and other ILECs ask the Commission to force some special access customers to continue to pay their excessive tariffed rates in order to "protect" them from a significant loss of revenues. Specifically, these ILECs request that users of the EEL combination of network element be prohibited from using that UNE solely to provide exchange access services. (Apparently, these ILECs do not intend to limit the use of EELs for services that include advanced services or a local component.) These ILECs base this request on vague assertions that universal service may be impacted without such protectionism, and urge the Commission to adopt restrictions on the use of UNEs which the Commission has already concluded are unlawful under the 1996 Act. While CompTel recognizes that all carriers still are adapting to the fundamental changes established by the Act, calls for restrictions on the use of EELs – even "temporary" restrictions – should be rejected.

When examined closely, the ILECs' arguments in support of a use restriction do not hold water. First and most important, the asserted need for the unlawful restrictions is

overblown. Though BellSouth and others repeatedly claim that "access charges" support universal service, they fail to identify any subsidies embedded in *special access* services. This is not surprising, given that they have claimed for ten years that special access rates were cost-based, and the Commission has repeatedly rejected claims that special access contained universal service subsidies. While it is true that carriers using UNEs for exchange access purposes are likely to lower their costs, that was one of the primary purposes of the pricing flexibility the ILECs were granted in August of last year. Thus, the Commission should view any lowering of access revenues as a benefit of competition, not a danger to be avoided.

Second, the restriction these ILECs urge is unlawful. The Commission has repeatedly held – and explicitly reaffirmed in the *UNE Remand Order* – that Section 251(c)(3) unambiguously prohibits ILECs from restricting the use to which requesting carriers may put UNEs. Nothing in Section 251(g) compels abandonment of this principle. Furthermore, the Eighth Circuit's decision in *CompTel v. FCC* does not support the result the ILECs urge. That decision dealt with a pricing decision by the Commission, not a use restriction on network elements. Although it approved a temporary deviation from the Act's cost-based pricing requirement, the Court found that the decision was necessary to harmonize an explicitly contrary statutory deadline in Section 254. No such deadline applies here.

Finally, although these ILECs contend that the issues of the *Fourth Further Notice* are strictly "IXC" issues, that is not the case. All of CompTel's members, including those using EELs to provide local services to their customers, will be affected by a use restriction. A use restriction lends itself to a "Mother, may I?" gatekeeping and creates yet another opportunity for litigation over competitors' entry strategies. Moreover, a use restriction invites the danger of "restriction creep" as carriers increasingly define new services that do not easily fit traditional

categories such as "local" service. For example, how would dedicated Internet access circuits be treated under the ILECs' use restriction? Which data services are local? These and similar concerns that will arise as requesting carriers increasingly deviate from the classifications traditionally used by incumbents demonstrate that, even if the Commission concludes that there is a valid short term transitional goal in this circumstance, it should not attempt to achieve that goal through a use restriction.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments on the *Fourth Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-captioned proceeding.[1] With over 350 members, CompTel is the principal national industry association representing competitive telecommunications carriers. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

CompTel has long supported the so-called "enhanced extended link" ("EEL") as an important tool for bringing competition to consumers. CompTel's members need EELs to provide local telecommunications services in an efficient manner. The utility of the EEL is not limited to strictly "local" service, however, as CompTel members also plan to use EELs for a variety of purposes that do not easily fit the "local" classification. For example, integrated

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999)("*FNPRM*").

communications providers ("ICPs") would use EELs for a combination of services, some of which traditionally fall in the local or interexchange categories, but some of which do not. EELs also may be used to provide high-speed data communications, such as ATM or frame relay services. In addition, as the *Fourth Further Notice* recognizes, EELs are functionally equivalent to special access services carriers purchase from the ILECs' interstate tariffs. Absent an FCC-imposed limitation, CompTel members would use EELs for some or all of these purposes, depending upon their own business needs. CompTel believes that the Commission should not interfere with a requesting carrier's decision as to how it will use this network element.

I. INTRODUCTION

In the *UNE Remand Order*, the FCC again concluded that Section 251(c)(3) entitles a requesting carrier to use an unbundled network element to provide any telecommunications service it seeks to offer.[2] Finding the statutory language "unambiguous," the Commission concluded that the Act does not permit ILECs to impose use restrictions on a requesting carrier's access to network elements. It explicitly reaffirmed rule 309 of its Rules, which prohibits ILEC use restrictions.

In addition, the Commission clarified that requesting carriers are able to obtain a combination of loop, multiplexing, and transport known as the enhanced extended link ("EEL"). It stated that requesting carriers are permitted to order this combination under the ILECs' special access tariffs, and convert the pre-existing combination to UNEs pursuant to Section 315(b) of the Commission's rules. It specifically concluded that, at least with EELs that do not include an "entrance facility" component, carriers are entitled to obtain an EEL through this method.

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[2] In addition, the Commission confirmed again that the Act opens all pro-competitive entry strategies to competitors and allows competitors to choose among these strategies as they see fit. *See, id.* at ¶¶ 52, 68.

Based upon last minute *ex parte* letters from BellSouth and a few other ILECs raising concern that use of the EEL may threaten universal service, the FCC asked for comment on whether it had authority to limit the use of EELs containing an entrance facility component.[3] Specifically, the Commission asked whether it has authority under the "just and reasonable" language of Section 251(c)(3) to permit a use restriction, whether Section 251(g) permits a use restriction, or whether the Eighth Circuit's decision in *CompTel v. FCC* provides a basis for a temporary limitation on the use of an EEL.

The ILEC *ex* partes made two basic arguments. First, they claim that special access services support universal service and that an unrestricted EEL would erode this support. Building from this presumptive tie to universal service, these ILECs assert there is a valid governmental role to assure that existing special access rate levels are protected from competition. Second, they claim that placing restrictions on the EEL would promote more local competition by encouraging facilities construction. Although not a justification for restricting the EEL, these ILECs also claim that an EEL restriction could be "easily" implemented and enforced[4] – even though no single restriction was easily defined.

As shown below, none of these claims can be justified by the facts. There is *no* evidence that universal service concerns have played *any* role in special access pricing. To the extent that special access prices produce supra-competitive profits, these profits promote the

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[3] In a Supplemental Order, the Commission expanded this issue to address uses of EELs for exchange access purposes even if the EEL did not include an entrance facility. *Implementation of the Local Competition Provisions of the Telecommunications* Act, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) ¶ 6. The Commission also required, until June 30, 2000, carriers receiving EELs to self-certify that the EEL would be used for a "significant amount" of local traffic. *Id.*, ¶ 4.

[4] For instance, although it was claimed that a restriction could be implemented through "self-certification," this suggestion was quickly modified with the observation that "some auditing" may be necessary.

ILECs' commercial interest and not the public interest. Protecting the largest ILECs' special access revenues simply is not a legitimate governmental policy, particularly when, in New York at least, competitors (including "stand alone IXCs") must compete against an input monopolist that faces only the true economic cost of special access.[5] Nor is there any reason to expect an EEL to materially change conventional network investment decisions. To the contrary, an EEL network element would foster lower prices for telecommunications services and spur growth in all telecommunications services by enabling all carriers to obtain cost-based inputs for whatever services they offer, including exchange access. Finally, the restriction advocated is neither lawful, nor easily defined or enforced. Each of these issues is addressed in turn below.

II. THE NEED FOR THE UNLAWFUL RESTRICITION IS EXAGGERATED AT BEST

The ILECs' entire case begins with the proposition that there is a valid government interest in protecting their special access revenues. In an effort to provide a policy justification for protecting these revenues from competition, the ILECs supporting a use restriction seek to link their special access prices to the social goal of universal service.[6] Aside from the bald assertion that such prices have been driven by such considerations, however, they have provided no evidence that anything other than their own commercial self-interest is at stake in their special access pricing policies.

To begin, the ILEC proponents are extremely vague on how special access supports universal service. Relying almost exclusively on the Commission's statement that

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5 The ability to charge above-cost prices to one's downstream competitors is a classic example of monopoly power. Perpetuation of this scenario threatens the pace of competition in retail services.

6 *See, e.g.*, Letter from William B. Barfield, BellSouth, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, filed August 9, 1999 ("BellSouth ex parte").

Section 251, universal service and access charges (generally) are "intensely interrelated,"[7] the ILEC proponents do not identify any special access rate elements that allegedly support universal service. Nor do they identify how much "support" allegedly flows from special access rates. This type of evidence, of course, is critical to assessing any claim that universal service may suffer as a result of the Commission's UNE rules affecting special access services. Unless and until a connection is established and the magnitude of the alleged impact is fully supported, the Commission should be wary of adopting "transitional" policies to restrict requesting carriers' rights under the 1996 Act.

Putting aside the lack of evidence to date, the claim that special access supports universal service is implausible on its face. First, the Commission has *never* prescribed specific rate elements for special access services.[8] Nowhere in its special access orders does the Commission establish any explicit support for universal service. To the contrary, ILECs have always enjoyed considerable flexibility in determining the pricing of individual special access products and services, provided an overall revenue requirement was met. Ostensibly, this flexibility was provided to enable ILECs to *lower* rates in response to "competitive pressures." To CompTel's knowledge, the Commission's primary motivation in special access policies has been to reduce special access rates to cost, not to keep them artificially high.

Second, as long ago as 1989, the ILEC proponents of a use restriction were justifying special access prices as based solely on cost and commercial considerations.

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7 *See, e.g., BellSouth ex parte* at 3.

8 *Access Charge Reform,* Fifth Report and Order, Further Notice of Proposed Rulemaking, FCC 99-206, ¶ 8, CC Docket No. 96-262 et al. (rel. August 27, 1999) (*Access Reform Fifth Order).*

Disclaiming all "strategic pricing" objectives, the ILECs repeatedly claimed that their rates were "cost-based." For example:

> **BellSouth:** ...A number of parties allege BellSouth has employed strategic pricing for its high capacity services without complying with the strategic pricing guidelines.
>
> Such allegations are inexplicable. In Volume 1 of supporting documentation it was explicitly stated "that BellSouth has established cost-based rates in this filing for high capacity services...."[9]
>
> ***
>
> **SWBT:** In 1988, Southwestern Bell's strategically priced rates were based on the prices of competitive alternatives rather than any strategic purpose.[10]
>
> ***
>
> **U S West:** Independently, [US WEST's] Target [Special Access] Rates are not strategically priced because no factors other than cost have been used to build these rates.[11]

Compounding these ILECs' logical inconsistency is the fact that the FCC has examined – but rejected – claims that special access rates include universal service support flows. In the *Expanded Interconnection* proceeding, the Commission authorized competitive carriers to interconnect for the purposes of providing competing special access services. In setting rates for such interconnection, the Commission concluded that any "contribution" included in the rates "should be targeted to recover only specifically identified regulatory support

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9 BellSouth Reply, Annual 1989 Access Tariff Filing, Transmittal No. 225, page 5.

10 Southwestern Reply at 37, cited in Memorandum Opinion and Order, DA 89-337, March 22, 1989, paragraph 503.

11 US WEST's Reply at 44, cited in Memorandum Opinion and Order, DA 89-337, March 22, 1989, footnote 536.

mechanisms or non-cost-based allocations" that are embedded in ILEC special access rates.[12] After inviting ILECs to justify any such "contribution," the Commission rejected the ILECs' claims that special access rates were artificially inflated. It expressly did not include a contribution charge in ILEC expanded interconnection tariffs because the Commission identified and *removed* the only potential support flow that its investigation found:

> Based on the present record, *the only significant non-cost-based support flow imposed by our regulations affecting special access* is the over-allocation of General Support Facilities (GSF) costs to special access. . . . [W]e believe . . . it would be far more desirable to revise the Part 69 rules to allocate GSF costs proportionally to all services.[13]

Notably, even though the Commission invited the ILECs to propose contribution charges in its 1992 *Expanded Interconnection Order*, in the seven years since this decision was issued, none have done so.[14]

The same conclusion is apparent from the Commission's universal service proceedings. Section 254 requires the Commission to remove implicit subsidies for universal service in favor of "specific, predictable and sufficient" federal and state universal service support mechanism.[15] The Commission, in consultation with a Federal-State Joint Board, has reviewed a number of allegedly implicit subsidies, and continues to develop explicit support based on ILEC costs. Despite over three years of review to date, the *Universal Service*

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12 *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 146 (1992), subsequent history omitted.

13 *Id.*, ¶¶ 147-48 (emphasis added).

14 *See id.*, ¶ 143 ("We will, however, permit the LECs to seek approval of a contribution charge based on other support flows").

15 *See, e.g., Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776 (1997).

proceeding has not identified any implicit subsidies flowing from the ILECs' special access services.[16]

In sum, there is simply no evidence that interstate special access prices have been established to maximize any goal other than the largest ILECs' commercial dominance.[17] Given this lack of evidence, the Commission should be skeptical of any requests for restrictions on the use of UNEs. Any transitional plan for UNEs must, as a logical prerequisite, contain a solid backing based on a short-term problem to be addressed. The ILEC proponents arguments to date do not establish such a problem, as the only thing that appears to be at risk is their ability to coerce customers into paying their super-competitive prices.

III. THE COMMISSION SHOULD NOT IMPOSE ANY USE RESTRICTIONS ON EELS

As shown above, the claimed need for a transition has not been established. In the event that any valid transitional goal is identified by the Commission, CompTel recognizes that some short-term approach may be necessary. However, as explained below, CompTel strongly opposes the imposition of a use restriction as the means to address any transitional concern. Use restrictions are unlawful under the Act, difficult to administer and dangerous in their long term implications.

A. Use Restrictions on UNEs are Contrary to the Act's Plain Language

Section 251(c)(3) of the 1996 Act imposes upon ILECs:

> The duty to provide, *to any requesting telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point*

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16 *See, id.* At ¶¶ 750-771 (discussing changes to LTS, SLC and CCL rate elements, but not identifying modifications to special access rates); Access Charge Reform, First Report and Order, 12 FCC Rcd 15982 ((1997).

17 Similarly, although the ILECs also claim that *intrastate* special access prices support universal service, none has offered any evidence that such is the case.

> on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*[18]

The Commission has already found that Section 251(c)(3) "unambiguously" permits carriers to use UNEs to provide any telecommunications service. In the *Local Competition Order*, the Commission found that "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements,"[19] and, therefore, that ILECs "*may not impose restrictions upon the uses* to which requesting carriers put such network elements."[20] Moreover, it found that "the plain language of Section 251(c)(3) does not obligate carriers to provide all services that an unbundled element is capable of providing or that typically are provided over that element."[21] The Commission emphasized its finding by observing that "there is no statutory basis by which we could reach a different conclusion," because the statutory language is "not ambiguous."[22]

Based on its interpretation of this statutory language, the Commission adopted regulations that prohibit ILECs from restricting in any manner the types of telecommunications services that requesting carriers can provide using UNEs. For example, Rule 51.307(c) requires

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18 47 U.S.C. § 251(c)(3) (emphasis added).

19 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 264 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

20 Id., ¶ 27 (emphasis added).

21 *Id.*, ¶ 264.

22 *See id.*, ¶ 359 (emphasis added).

ILECs to provide UNEs "in a manner that allows the requesting carrier to provide any telecommunications carrier to provide *any telecommunications service that can be offered by means of that network element.*"[23] Rule 307's emphasis on any telecommunications service capable of being offered underscores that carriers are free to use UNEs in ways that differ from the ILECs' classifications, and even to substitute for other services provided by an ILEC. Similarly, Rule 51.309(a) prohibits ILECs from imposing any "limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner the requesting carrier intends."[24] Finally, Rule 51.309(b) provides that a "telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers."[25] The Commission correctly recognized that these rules are compelled by the unambiguous language of Section 251(c), which grants the competitor, not the incumbent, the right to decide whether and in what manner it will use UNEs.

None of the ILEC proponents' attempts to avoid these clear pronouncements has merit. First, it is sometimes claimed that the Commission made these findings solely "for the long term."[26] However, the Commission clearly based its decision on the plain language of the statute, and it did not limit their application to some future date. The Commission's reference to the "long term" in connection with its now-ended transitional pricing plan does not take away

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23 47 C.F.R. § 51.307(c) (emphasis added).

24 47 C.F.R. § 51.309(a).

25 47 C.F.R. § 51.309(b).

26 *See, e.g.,* Letter from Martin E. Grambow, SBC, to Lawrence E. Strickling, FCC, CC Docket No. 96-98, filed August 11, 1999, at 5.

from the statutory obligation to permit carriers to employ a UNE for any telecommunications service capable of being provided using that element.

Second, it is claimed that Section 251(c)(3) permits "just and reasonable" terms and conditions to be imposed on UNEs to limit their use. Curiously, the ILECs advocating a use restriction make no effort to square this argument with Section 51.309 of the Commission's rules, which clearly prohibits the ILECs from restricting the use of UNEs. Nevertheless, the quoted language on which they rely refers to terms and conditions of *access* to the UNE, not to the use of the UNE.[27] In the *Local Competition Order*, the Commission concluded that "access" to a network element "refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service."[28] Thus, although Section 251(c)(3) permits the ILECs to establish just and reasonable terms and conditions for how a carrier connects to an element to obtain its functionality, it does not permit them to limit the functionality of the element itself.

In addition, Section 251(c)(3) further limits the terms and conditions an ILEC may apply. It requires that these terms and conditions must be provided "in accordance with . . . the requirements of this section [Section 251]." Under this provision, any conditions for interconnecting to obtain a UNE, in addition to being "just, reasonable and non-discriminatory" must be consistent with Section 251(c)(3)'s right to use UNEs "for the provision of a telecommunications service." This limitation is, of course, embodied in Section 51.309 of the

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27 Section 251(c)(3) requires an ILEC to provide "nondiscriminatory access . . . on rates, terms and conditions that are just, reasonable, and nondiscriminatory ...."

28 *See, Local Competition Order*, ¶ 269.

Commission's rules, which prohibits ILECs from imposing any "limitations, restrictions or requirements" on the use of unbundled network elements.[29]

Third, the ILEC proponents claim that *CompTel v. FCC* authorizes "temporary" restrictions to achieve universal service purposes.[30] This argument, of course, depends upon the existence of a connection between use of an EEL and universal service, which, as described above, has not been established. In any event, the ILECs read the *CompTel* decision too broadly. In *CompTel*, the Court evaluated a *pricing decision* by the Commission, not a restriction on the use of a UNE. Carriers purchasing local switching network element at issue were free to use that element for any purpose whatsoever. The price established by the Commission's rule was short term in nature, expiring by its own terms less than 9 months after it was adopted.[31] Most importantly, however, the pricing decision was required by an explicit and necessarily conflicting statutory deadline imposed on the Commission. While the Commission had to adopt its UNE rules by August 1996, Section 254 did not require a decision on universal service until May 1997. The Court found that, due to the nine month disparity between these statutory deadlines, "universal service soon would be nothing more than a memory" without an interim pricing rule.[32] Thus, the rule was necessary "in order to effectuate" Section 254.[33]

Indeed, the Commission expressly anticipated and rejected claims that this "transition" could be extended for other purposes. The Commission stated:

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29 47 C.F.R. § 51.309(a).

30 *See CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

31 *See CompTel* at 1073 ("it is significant to our review for unlawfulness that the [prices] presently being assessed may be collected no later than June 30, 1997").

32 *Id.* at 1074.

33 *Id.*

> We have selected June 30, 1997 as an ultimate end date for this transitional mechanism to coincide with the effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement . . . would be extended further. *The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs.* By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry.[34]

In short, the *CompTel v. FCC* decision was the result of a limited conflict between statutory deadlines. No such conflict exists at this time. Therefore, there is no basis for an interim requirement in this instance.

Similarly, the Commission could not rely on Section 154(i) standing alone to adopt a use-based restriction. It is well established that the Commission has no authority to promulgate regulations contrary to express statutory provisions.[35] Because the Commission has determined that Section 251(c)(3) mandates that interexchange carriers be allowed to purchase unbundled network elements in order to provide any telecommunications service, including exchange access, it has no authority to rely on Section 154(i) by itself to adopt use-based restrictions. Finally, the Commission cannot forbear from applying Section 251(c)(3) in order to adopt a use-based restriction because Section 251 has not been fully implemented.[36]

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34 *Local Competition Order*, ¶ 725 (emphasis added).

35 *See* 47 U.S.C. § 154(i) (the Commission "may perform any and all acts . . . not inconsistent with this Act"); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201 (1956) ("§ 154(I) . . . grant[s] general rulemaking power not inconsistent with the Act or law").

36 *See* 47 U.S.C. § 160(d) ("[T]he Commission may not forbear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented.).

B. Any Use-Based Restriction would Create Additional Litigation and Cause Further Uncertainty

As noted at the outset, CompTel's principal policy interest in this proceeding is assuring that its members have a full opportunity to access any and all network elements they require to fulfill their wide range of business strategies. Since the 1996 Act was first passed, CompTel has seen time and again that its members address this market though imagination and innovation, freed from the preconceptions of their incumbent competitors. This process can continue, however, *only* if entrants remain able to purchase and use network elements as *generic* capabilities, with total freedom to fully exploit the potential of such elements to offer any (and every) service possible.

While CompTel is mindful that the largest ILECs disclaim – at this time at least – any desire to restrict "local" uses of EELs, *any* use restriction inevitably would constrain competition by forcing entrants to conform to whatever artificial limitation is imposed. Notably, should the Commission accede to these ILECs' request, it will forever contaminate the UNE framework, as this Commission (and then the States) would be asked to consider *additional* restrictions and interpret *existing* ones. Implementation of a use restriction would simply add another litigation point to an already contentious process. Each and every new service – as well as the status of existing services[37] – would be forced through a "compliance gauntlet" of

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[37] For instance, the ILECs frequently refer to "special access" as though these circuits are all used consistently by carriers and customers in some predictable manner and that, therefore, a restriction that applies to "special access" would have some consistent meaning and effect. The fact of the matter, however, is that "special access" refers to a broad category of transmission arrangements that are used to provide a variety of services, including local services, local area networks, and data services, as well as connections to long distance networks. The only thing that all special access circuits have in common is that they coexist in the same ILEC tariff, and carriers have ordered capacity from these tariffs (as opposed to UNEs) because there were established procedures to have the circuits provisioned. There is not, however, a single common use (continued...)

increasing complexity and dispute. Every new service would be under a cloud, as ILECs argue that the service fits within the restricted category, while entrants just as predictably argue that it does not. Rather than devoting energy and investment to innovation and new networks, entrants would be forced to recover unnecessary litigation expense in the price of each new service.

Equally troubling are the definitional issues that any restriction would raise. In particular, CompTel is concerned that even a transitional use restriction would impact CLEC members using EELs as part of a package of services. For instance, the Supplemental Order's requirement that requesting carriers self-certify they will provide a "significant amount" of local service raises a number of questions (putting aside questions about what constitutes "significant" service):

- What is a "local" service? For instance, in Texas, customers can opt into different "local" calling areas by subscribing to optional metropolitan calling plans. Which plans provide "local" service?
- May entrants designate their own "local" services? What if an entrant's "local" service includes service that the ILEC classifies as interexchange for its customers?
- May more than one carrier provide "local" service to the same customer?
- Are Internet access services "local"? Which data services are local? Which are not?
- Who would decide what constitutes a "local" service?
- How can an entrant determine if a DS-3 interoffice pipe is providing "local" service when it is used for multiple customers?

(...continued)
of "special access" that corresponds to the restrictions that the ILECs themselves have proposed (such as a requirement that a UNE be used to provide "local service").

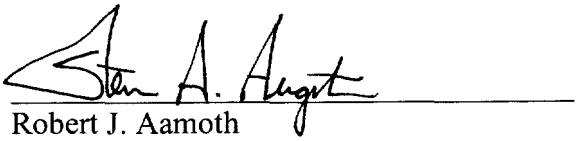
Significantly, the above discussion only scratches the surface of the types of issues that the suggested restriction would create. As indicated earlier, the Commission should remember that the ILEC will not be asking itself these questions as it decides what services it will offer – or, if it does, it can choose to believe and interpret its answer to best suit its purpose. Opening the door to restrictions on UNEs is a quagmire of unprecedented dimension that this Commission should avoid at the outset.

IV. CONCLUSION

For the foregoing reasons, the Commission should act promptly to ensure that requesting carriers may use EELs to provide exchange access service, regardless of whether the carrier is also providing local telecommunications services. Unrestricted use of UNEs not only is required by the unambiguous language of the statute, but it also promotes lower prices and additional competitive alternatives. Accordingly, the Commission should affirm that carriers may use EELs solely for exchange access purposes.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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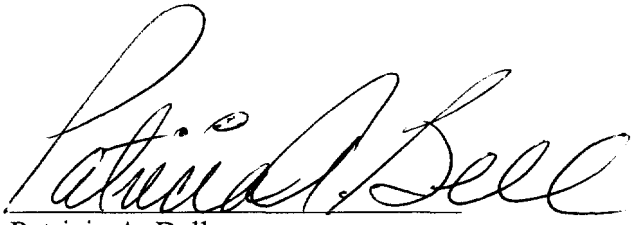
January 19, 2000

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **"Comments of the Competitive Telecommunications Association"** were served via courier this 19th day of January, 2000 to each individual on the attached service list.



Patricia A. Bell

Service List in CC Docket 96-98

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